Supreme Court, U.S.
FILED
98 202 JUL 29 1998
OFFICE OF THE CLERK

No. _____

In The
Supreme Court of the United States

October Term 1997

PORTEAL GROOM,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petition for Writ of Certiorari

Mark J. Kadish
Counsel of Record
The Law Firm of MARK J. KADISH
180 Lindbergh Drive
Suite B
Atlanta, Georgia 30305
(404) 816-8997

Counsel for Petitioner

THE LEX GROUP • 1205 East Main Street • Suite 2 E • Richmond, VA 23219
(804) 644-4419 • (800) 856-4419 • Fax: (804) 644-3256

52 pp

QUESTIONS PRESENTED

1. Whether the District erred in admitting foreign business records pursuant to 18 U.S.C. §3505 where the government failed to establish the necessary foundation, and offended the Confrontation Clause of the Sixth Amendment to the United States Constitution.

2. Whether the District Court erred in admitting expert testimony on the narcotics profile in violation of Rule 404, Federal Rules of Evidence and the Due Process Clause of the Fifth Amendment to the United States Constitution.

3. Whether the District Court erred in sentencing Petitioner in violation of law by granting an enhancement under Sentencing Guidelines 3B1.1(b) where evidence was insufficient to prove a management or supervisory role.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iv

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL PROVISIONS INVOLVED 1

STATEMENT 2

INTRODUCTION AND SUMMARY OF ARGUMENT 5

ARGUMENT 6

I. Whether the District Court erred in admitting foreign business records pursuant to 18 U.S.C. §3505 where the government failed to establish the necessary foundation, and offended the Confrontation Clause of the Sixth Amendment to the United States Consititution 6

II. Whether the District Court erred in admitting expert testimony on the narcotics profile in violation of Rule 404, Federal Rules of Evidence and the Due Process Clause of the Fifth Amendment to the United States Constitution 12

III. Whether the District Court erred in sentencing petition in violation of law by granting an enhancement under Sentencing guidelines 3B1.1 where evidence was insufficient to prove a management or supervisory role 15

CONCLUSION 21

APPENDIX ..... App. i

TABLE OF AUTHORITIES

Cases:

Bruton v. United States,
391 US 123 (1968) 21

Idaho v. Wright,
497 U.S. 805 (1990) 11

People v. Derello,
259 Cal. Rptr. *265, 211* Ca.
op. 3d 414 (Ct. App. 1989) 14

People v. Martinez,
12 Cal. Rptr. 2d 838, 10
Cal. App. 4th 1001 (Ct. App. 1992) 12, 13

Roberts v. Ohio,
448 U.S. 56 (1980) 11

Sandstrom v. Montana,
442 U.S. 510 (1979) 15

State v. McMillan,
590 N.E.2d 23 (Ohio Ct. App.1990) 13

State v. Williams,
525 N.W.2d 538 (Minn. 1994) 13, 14

United States v. Fells,
920 F.2d 1179 (4th Cir.1990), cert. denied,
501 U.S. 1219 (1991) 18

United States v. Fones,
51 F.3d 663 (7th Cir.1995) 16

United States v. Hernandez-Cuartes,
717 552F.2d 555 (11th Cir.1983).....12

United States v. James,
883 F.Supp 83 (E.D. Va. 1995)
(citing *United States v. Mobley*,
Unpublished Opinion 1994 WL 378052 at *4-5).....16, 17

United States v. Jones,
913 F.2d 174 (4th Cir. 1990), cert. denied,
498 U.S. 1052 (1991).....12

United States v. Palinkas,
938 F.2d 456 (4th Cir. 1991), vacated sub nom,
Kochekian v. United States,
503 U.S. 931 (1992), and reinstated sub nom,
United States v. Kochekian,
977 F.2d 905 (4th Cir. 1992).....20

United States v. Ross,
33 F.3d 1507 (11th Cir.1994), cert. denied,
115 S.Ct. 2558 (1995).....11

United States v. Shair Chan,
680 F. Supp. 521 (E.D.N.Y. 1988).....7, 8

United States v. Sturman,
951 F.2d 1466 (6th Cir. 1991), cert. denied,
504 U.S. 985(1992).....7, 11

United States v. Tedder,
801 F.2d 1437 (4th Cir. 1986), cert. denied,
480 U.S. 938 1987).....10

United States v. Urbanik,
801 F.2d 692 (4th Cir. 1986).....21

Constitutional Provisions:

U.S. Const., amend IV 1

U.S. Const., amend V 1

U.S. Const., amend VI 1, 11

Federal Statutes:

18 U.S.C. § 2 2

18 U.S.C. § 952 2

18 U.S.C. § 963 2

18 U.S.C. § 1305 6

18 U.S.C. § 3491 10

18 U.S.C. § 3505 ..... passim

21 U.S.C. § 841(a)(1) 2

21 U.S.C. § 846 2

28 U.S.C. §1254 1

Federal Rules:

Fed. R. Crim. P. 26.1 9

Fed. R. Crim. P. 52(b) 11

Fed. R. Evid. 403 4

Fed. R. Evid. 404 ..... 5, 13

Fed. R. Evid. 702 4

Fed. R. Evid. 801(d)(2)(E) 20

Fed. R. Evid. 803(6) 7

Sentencing Guidelines:

Fed. Sentencing Guideline § 3B1.1, Application Note 2 16

Fed. Sentencing Guideline § 3B1.1, Application Note 4 18

Fed. Sentencing Guideline § 3B1.2 20

Miscellaneous Citations:

Mark J. Kadish, The Drug Courier Profile: In Planes, Trains, and Automobile; And Now In The Jury Box, 46 Amer. L. Rev. 748 (1997) 15

Dean J. Nossel, Note, The Admissibility Of Ultimate Issue Expert Testimony By Law Enforcement Officers In Criminal Trials, 93 Colum. L. Rev. 231 (1993) 14

Jack B. Weinstein & Margaret A. Berger, Weinsteins Evidence Manual, § 7.01(01) (1996) 13

Gregory L. Young, The Role Of Stereotyping In The Development And Implementation Of The D.E.A. Drug Courier Profiles, 15 Law & Psychol. Rev. 331 (1991) 14

OPINIONS BELOW

The opinion of the court of appeals is unpublished, No.96-4908, April 13, 1998. (App 1-17) Petition for Rehearing was denied by the Court of Appeals on May 11, 1998. (App 18-19)

JURISDICTION

The judgment of the court of appeals was entered on April 13, 1998. (App 1) The jurisdiction of this court rests on 28 U.S.C. § 1254(l).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourth Amendment provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The Fifth Amendment provides, in part:

> . . .nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law. . .

The Sixth Amendment provides, in part:

> In all criminal prosecutions, the accused shall enjoy the right . . .to be

informed of the nature and cause of the accusation; to be confronted with the witnesses against him. . .

STATEMENT

Following a jury trial in the United States District Court for the District of Maryland, Southern Division, Petitioner was convicted on June 10, 1996 of conspiracy to possess heroin with intent to distribute in violation of 21 U.S.C. § 846; possession with intent to distribute heroin in violation of 21 U.S.C. § 841(a)(1) and 18 U.S.C. § 2; conspiracy to import heroin in violation of 18 U.S.C. § 963; and, importing heroin in violation of 18 U.S.C. § 952, 18 U.S.C. § 963 and 18 U.S.C. § 2. Petitioner was sentenced on November 25, 1996 to a lengthy term of imprisonment followed by supervisory release. An appeal was taken to the United States Court of Appeals for the Fourth Circuit on November 25, 2996. The Court of Appeals, in an unpublished decision, affirmed on April 13, 1998, Case Number 96-4908, (App 1-17) and a Petition for Rehearing was denied on May 11, 1998. (App 18-19)

On May 13, 1996, co-defendant Minerva Mojica pled guilty to Count One of the four-count Indictment pursuant to a plea agreement, which provided that the government would move to dismiss all remaining counts at the time of sentencing if Mojica fulfilled her obligations under the agreement. Under the agreement, Mojica would cooperate with the government and was eligible for a 10 level downward departure from a base offense level of 36. In a letter dated May 16, 1996, AUSA Salem advised Petitioner that an addendum had been added to Mojica's plea agreement permitting an additional unspecified downward departure.

At trial, Pakistani Case Agent Javaid Mughal testified that the Americans initially arrested in Pakistan with the heroin which was to be imported to the United States told him that Michael Sirianni, Eddie Banks, and Sabrina were

involved in the conspiracy. These Americans pled guilty to violations of Pakistani law and were sentenced there. Following further information provided by the three Americans, Mughal collected various Pakistani hotel receipts as evidence. The hotel custodians certified each of the documents with "an attested stamp to the legitimacy of the record as a hotel record." Mughal then took the documents to the American consulate for re-certification. The District Court admitted these documents under 18 U.S.C. § 3505 over strenuous objection after an extended colloquy.

Later, at JFK International Airport, DEA agent Donald Bailey began surveillance at the arrival gate of the Pakistan International Airlines flight on which the three Americans had been ticketed, looking for the person who was expected to meet the Americans. Based on descriptions given by the three Americans, Bailey found and arrested Michael Sirianni who immediately agreed to co-operate. Sirianni participated in a controlled delivery scheduled to take place with "Eddie Banks" in Maryland. At trial, Sirianni identified Wardrick (Petitioner's co-defendant) as the man he knew as Eddie Banks. Over objection, Sirianni also testified to his involvement in the conspiracy and the events that occurred on the night of the Petitioner's arrest.

Mojica explained her participation in the conspiracy and corroborated Sirianni's testimony. By her own testimony, Mojica participated in recruiting people for the trips to Pakistan; obtained passports and visas; purchased suitcases and plane tickets; and made payments to the travelers. She allegedly did these acts at the direction and expense of Wardrick. Additionally, Mojica accompanied Wardrick to the controlled delivery site where she, alone, communicated with Sirianni. After Sirianni brought the suitcases to the lobby of the hotel, Mojica attempted to leave with the suitcases at which time she was arrested.

In preparation for her testimony, Mojica met with the prosecutors and the DEA case manager on at least four occasions, each lasting from four to six hours The last

meeting was the day before she began to testify. She also admitted that she was required as a part of her plea agreement to "say something" about Petitioner. A key and final government witness was Johnny St. Valentine Brown, a consultant to the Metropolitan Police Department for the District of Columbia. Over objection, Mr. Brown testified as an expert in international narcotics distribution. He discussed the process of making heroin, the role of Pakistan in the international drug trade, the methods of transporting drugs, the various participants in a drug ring, wholesale and retail prices of heroin, and the "profile" of a narcotics distributor. The "profile" characteristics of a narcotics distributor included the use of pagers, cellular phones, and pre-paid phone cards; Mr. Brown stated all three were communication devices commonly used by narcotic distributors. He also testified that narcotics distributors usually have other business "fronts" in order to look legitimate. Testimony at trial showed the co-defendants possessed a cellular phone, pre-paid phone cards, and pagers at the time of their arrest, and each owned his own business.

Wardrick and Petitioner objected to the expert testimony. Wardrick objected to all of the testimony on the basis that it was cumulative and merely attempted to "bootstrap" the government's case by using testimony of the profile. Petitioner objected to any discussion of cellular phones or counter-surveillance techniques under Fed. R. Evid. 702 and Fed. R. Evid. 403.

Both defendants were convicted of all charges. The convictions were accepted and a Pre-Sentence Investigations (PSI) ordered on June 10, 1996. Petitioner's PSI recommended a three level enhancement under Sentencing Guideline 3B1.1 based on Petitioner's alleged management or supervisory role in the conspiracy. Petitioner's PSI also included a statement of fact about certain alleged subornation of perjury testimony expressly limited at trial as having "no relevance whatsoever" to Petitioner. The Court, over objection, granted the recommended enhancement.

INTRODUCTION AND SUMMARY OF ARGUMENT

1. The trial courts admission of foreign business records pursuant to 18 U.S.C. § 3505 (App 20-21) violated the clear mandate of the statute and offended the confrontation clause of the Sixth Amendment because the District Court admitted improper hearsay testimony which interfered with the Petitioner's constitutional guarantee to cross-examine the witnesses against him. This Court has not yet decided these important statutory construction issues and accompanying Sixth Amendment issues. Trial Courts require such guidance since the statute is being used by law enforcement with increasing regularity to interdict international drug trafficking cases.

2. The trial court admitted expert evidence from an experienced narcotics officer in an effort to present bad character of the Petitioner even though he did not testify and never put his character in issue. This stereotyping opinion evidence is designed to show the propensity of an accused to commit a drug offense. There seems to be no end to the creativity of law enforcement and the prosecutor to compare the defendant's behavior with unknown numerous third party drug dealers who commit drug offenses utilizing similar behavior and means such as pagers and cellular phones. Opinions of an increasing number of state courts have condemned this practice as offending state character rules and the due process clause. The profile-type testimony offered against the Petitioner in this case stereotyped him, and amounted to propensity and group character evidence in violation of Rule 404, Federal Rules of Evidence and the Due Process Clause. This issue is ripe for clarification by this Court because of the conflict between state tribunals and the Circuit Courts of Appeal. Like the first question

presented, this issue, in the trial context, has not been squarely met by this court.

3. The trial courts enhancement of petitioners sentence pursuant to 3B1.1 violated the provisions of the sentencing guidelines because the evidence presented to the court was insufficient to prove a management or supervisory role in the alleged drug importation. Petitioner's connection with the alleged conspiracy was slight and there was little testimony demonstrating any management or supervisory role. None of the witnesses were able to testify to any direct management exercised by Petitioner.

ARGUMENT

I. Whether the District erred in admitting foreign business records pursuant to 18 U.S.C. §3505 where the government failed to establish the necessary foundation, and offended the Confrontation Clause of the Sixth Amendment to the United State Constitution.

It appears that this Court has not addressed the questions presented by this issue. While the Court has been asked to grant certiorari in several cases, infra at 17, 18 and 22, the Court has not done so. 18 U.S.C. § 1305 (App 20, 21) has become an important statute often used by law enforcement in its international drug interdiction efforts. The statute should be strictly construed and the Government put to its proof so that the confrontation clause of the Sixth Amendment is not offended by its use. Granting certiorari in this case will resolve statutory and evidentiary questions that trial courts must now analyze on a daily basis. The circuit authority on the issues raised here is sparse. Thus, if this Writ is granted, this Court will have the opportunity to set needed precedent.

The government introduced Pakistani hotel records through Customs Agent Javaid Mughal. These documents were offered to corroborate co-conspirator testimony, and to link Wardrick and Petitioner to four non-testifying persons alleged to have been involved in the conspiracy. Foreign business records are only admissible when the proponent establishes the foundation requirements of 18 U.S.C. § 3505. To guarantee reliability, § 3505 requires the same foundation as the Fed. R. Evid. 803(6) exception to the hearsay rule). The only difference between the two provisions is that 18 U.S.C. § 3505 allows the foundation to be established by foreign certification instead of live testimony. 33 F.3d 1507, 1515 (11th Cir. 1994), cert. denied, 115 S.Ct. 2558 (1995) The foreign certification must attest that: (1) the record was made at or near the time of the occurrence it reflects by a person with knowledge of the record-keeping procedures (18 U.S.C. § 3505(a)(1)(A); *United States v. Sturman*, 951 F.2d 1466, 1489 (6th Cir. 1991), *cert. denied*, 504 U.S. 985 (1992)); (2) the record was kept in the ordinary course of business (18 U.S.C. § 3505(a)(1)(B)); (3) the business made such records as a regular practice (18 U.S.C. § 3505(a)(1)(C); and, (4) the record, if a copy, is authentic (18 U.S.C. § 3505(a)(1)(D). (App 20-21)

A "foreign certification" is required to be in the form of an affidavit by the foreign record custodian made under "criminal penalty of the laws of that foreign country." 18 U.S.C. § 3505(c)(2). (App 20-21) Therefore, the trustworthiness of documents admitted under § 3505 depends on the deterrent force of the criminal law of the foreign country instead of in-court cross examination of the record custodian. *United States v. Shair Chan*, 680 F. Supp. 521, 523 (E.D.N.Y. 1988).

Contrary to the District Court's understanding, § 3505 is not a "safe harbor provision" for records that cannot otherwise be authenticated. Congress passed § 3505 as "a simple, inexpensive substitute for the cumbersome and expensive procedures [formerly] required forthe admission

of foreign business records." *United States v. Shair Chan*, 680 F. Supp. 521, 523 (E.D.N.Y. 1988) (quoting H. Rep. No. 907, 98th Cong., 2d Sess. 3).

Here, the requirements of 18 U.S.C. §3505(a)(1)(A), (B), and (C) were not attested to at all; (App 20-21) and Agent Mughal's testimony could not cure that deficiency. As a Customs investigator, Mughal had no personal knowledge whether the foreign business records offered were timely made, whether they were made in the regular course of business, or whether the hotels regularly kept such records. His testimony was inadmissible hearsay, inadequate to establish the necessary foundational elements. Concerning 18 U.S.C. § 3505(a)(1)(D) (authentication), the foreign documents were offered only with a written notation that "Attached documents are true copies of the original." The written notation appears to have been made by Agent Mughal, the Pakistan Customs investigator, not the records custodians. Mughal testified that the record custodians in Pakistan date stamped and signed the records, but there is no direct evidence that the custodians attested that the documents were duplicates of originals. Mughal's testimony that the documents were duplicates was likewise inadmissible hearsay, therefore inadequate to prove the records were authentic.

Additionally, 18 U.S.C. § 3505(c)(2) clearly requires the foreign certification be made by one who would be subject to criminal penalties under the laws of the foreign country. No witness established that the person attesting to the foreign documents in this case would be subject to a criminal penalty under Pakistan law. Mughal's testimony that the record custodian's attestation was punishable by law was an improper legal conclusion and inadmissible hearsay. The Court erroneously ruled that Mughal was in court "to supplement whatever the document doesn't contain." Furthermore, the government did not request the District Court to take judicial notice of any Pakistan laws. See, *United States v. Shair Chan, Supra.* At 524 (E.D.N.Y. 1986)

(the court may take judicial notice of foreign law under Fed. R. Crim. P. 26.1). And Mughal himself testified that he did not know if he was subject to criminal penalty if he made a false statement to the American Consulate when authenticating the documents. Therefore, the District Court and the Fourth Circuit erred in finding that Mughal's testimony qualified the foreign documents for admission under § 3505(c).

The government also failed to provide appropriate notice to defendants. 18 U.S.C. § 3505(b) (App 20-21) states that "[a]t the arraignment or as soon after the arraignment as practicable, a party intending to offer in evidence under this section a foreign record of regularly conducted activity shall provide written notice of that intention to the other party." By these terms, and contrary to the District Court's reasoning, the statute positively requires that written notice explicitly indicate that the proponent intends to proceed under authority of 18 U.S.C. § 3505. The government, most significantly, admits that it never provided written notice of its intention to invoke § 3505; but simply disclosed that it was in possession of certain foreign documents and asked the Defense to "stipulate" admissibility.

The government's request to stipulate was not written notice of intent to invoke § 3505. The Defense is not required to stipulate to evidentiary admissibility and expressly declined to do so. Nor was the government's request to stipulate timely if it could be construed as notice. It was not made before arraignment or as soon thereafter as practicable. The request was made "six weeks or two months" before trial and approximately seven months after arraignment of the co-defendants. Furthermore, the government only sent copies of the foreign documents it wished to introduce, without attestations, and this did not occur until "May 1st or May 3rd;" only a few weeks prior to trial. Therefore, the District Court erred in ruling that the

government's request to stipulate was sufficient notice under 18 U.S.C. § 3505.

The District Court also erred in finding that the Defense waived the requirements of § 3505. The Court implied that the defense was as much at fault as the government in failing to comply with the requirements of § 3505 because they did not file a motion opposing the government's request to stipulate admissibility of the foreign documents. 18 U.S.C. § 3505 states that a party opposing invocation of the statute must file a motion in opposition or waive the right to object at trial. 18 U.S.C. § 3505(b). The District Court construed the statute to require the Defense to file a motion once it knew the government wanted to introduce the foreign records by stipulation. However, the statutory language requires written express notice as a condition precedent to any motion being filed in opposition. See, e.g, *United States v. Tedder*, 801 F.2d 1437, 1449, n.9 (4th Cir. 1986), *cert. denied*, 480 U.S. 938 (1987) (government's letter notifying counsel "indicated plainly that either 18 U.S.C. § 3491 or 18 U.S.C. § 3505 would support the admission of such evidence.) No express notice was given to Petitioner.

When notice is given and a motion in opposition is filed, § 3505 requires the Court to rule on the admissibility of the offered evidence before trial. This was not done. 18 U.S.C. § 3505(b) The Court admitted that there was a pretrial oral discussion of the government's request to stipulate and the defendants' refusal. Therefore, even if the government's conduct provided constructive notice to appellants, the Court was on constructive notice of the appellant's opposition. Consequently, the Court was in error to conclude that defendants waived opposition to admission of the foreign documents under § 3505.

Since 18 U.S.C. § 3505 establishes a number of prerequisite conditions for evidence offered under its provisions, the District Court was compelled to exclude evidence which failed to meet those conditions. Indeed, the

Court virtually ignored the protective requirements of §3505, leaving the defendant in an untenable trial posture which unfairly placed the government in a position of unfair advantage.

The Supreme Court has held that the "hearsay rules and the Confrontation Clause are generally designed to protect similar values." *Roberts v. Ohio*, 448 U.S. 56, 66 (1980). Therefore, defendants' hearsay objections to the § 3505 testimony also raise the fundamental constitutionally protected right to be confronted by the witnesses against them. Fed. R. Crim. P. 52(b); U.S. Const., amend VI; *See United States v. Sturman*, 951 F.2d 1466, 1490 (6th Cir. 1991), *cert. denied*, 504 U.S. 985 (1992) (finding no Confrontation Clause violation when the hearsay foundation under 18 U.S.C. § 3505 was met by the government). When the hearsay exception foundation is completely lacking, it follows that the trial court must strictly enforce the Sixth Amendment right of confrontation to ensure a fair and public trial.

Out-of-court statements not admitted under a firmly rooted hearsay exception are presumptively unreliable. *Roberts v. Ohio*, 448 U.S. 56, 66 (1980). 18 U.S.C. § 3505 is not a firmly rooted hearsay exception. *United States v. Ross*, 33 F.3d 1507, 1516 (11th Cir. 1994), *cert. denied*, 115 S.Ct. 2558 (1995). Thus, the government must first carry "its burden of proving that the [documents introduced in this case] bore sufficient indicia of reliability to withstand scrutiny under the [Confrontation] Clause." *Idaho v. Wright*, 497 U.S. 805, 816 (1990). The government failed to carry its burden; the records lacked any indicia of reliability under § 3505 and Mughal's testimony did not give the jury a sufficient basis for evaluating the reliability of the documents. *See United States v. Ross*, *supra*, at 1516 (11th Cir. 1994), *cert. denied*, 115 S.Ct. 2558 (1995).

By permitting the government to introduce unreliable foreign documents, the trial court allowed the government to bootstrap its conspiracy evidence. The critical purpose of

the hotel records was to link the three arrested Americans and the alleged Pakistani heroin supplier to testifying co-conspirator, Sirianni, and, by inference, to Petitioner. However, Petitioner had no opportunity to dispute the validity of the government's evidence through cross-examination of the hotel employees or the alleged guests of the hotel. The failure of the hearsay foundation destroys the probative value of this inferential link.

Furthermore, admission of the foreign documents permitted the government to corroborate the testimony of Sirianni and Mojica. Since the conspiracy case against Petitioner relied heavily on the credibility of those two witnesses, anything that impermissibly corroborated their testimony is extraordinarily prejudicial, constitutes plain constitutional error, requiring a new trial.

II. Whether the District Court erred in admitting expert testimony on the narcotics profile in violation of Rule 404, Federal Rules of Evidence and the Due Process Clause of the Fifth Amendment to the United States Constitution.

Profile evidence admitted at trial prejudicially influences juries by linking the defendant with a stereotypical narcotics distributor based on shared characteristics that may not be indicative of criminal activity. *See, e.g., United States v. Jones*, 913 F.2d 174 (4th Cir. 1990), *cert. denied*, 498 U.S. 1052 (1991); *accord, United States v. Hernandez-Cuartes*, 552 F.2d 555 (11th Cir. 1983) (use of drug courier profile evidence risks conviction for an other's criminal activity); *cf. People v. Martinez*, 12 Cal. Rptr. 2d 838, 841, 10 Cal. App. 4th 1001, 1006 (Ct. App. 1992) (rejecting car thief profile and holding that such profiles are "inappropriate for consideration on the issue of guilt or innocence for the very reason given in drug courier profile cases" because the conduct that makes up a profile is equally applicable to innocent activity and criminal activity.)

This "link" constitutes bad character evidence and contravenes. Rule 404, Fed. R. of Evid. *State v. Williams*, 525 N.W.2d 538, 547-48 (Minn. 1994). The co-defendants objected that the profile evidence was "bootstrapping" on all of the issues *Cf. People v. Martinez*, 12 Cal. Rptr. 2d 838, 842, 10 Cal. App. 4th 1001, 1008 (Ct. App. 1992)(categorizing use of auto theft ring profile as "bootstrap reasoning" and bad character evidence).

More specifically, profile testimony is what has become known as "group character" evidence. *State v. McMillan*, 590 N.E.2d 23 (Ohio Ct. App. 1990). Group character evidence is unfairly prejudicial for the same reason as individualized character evidence: improper propensity inferences. Id. "Normally proof of character involves witnesses who generalize on the basis of past acts of the defendant and this generalization is used to support an inference as to the conduct in issue." *State v. Williams*, 525 N.W.2d 538, 547-48 (Minn. 1994). Such generalizations are forbidden under Rule 404 due to the prejudicial impact of the evidence. *See* 2 Jack B. Weinstein & Margaret A. Berger, *Weinsteins Evidence Manual*, § 7.01(01) (1996). Evidence of group character is even worse than traditional character evidence because the "profile involves a generalization based on the past act of *third persons*." (Emphasis added) *Williams*, 525 N.W.2d at 547-48; *State v. McMillan*, 590 N.E.2d 23 (Ohio Ct. App. 1990) (holding that evidence of sexual abuser profile was so unreliable and prejudicial that it should not be used even when the defendant puts his character in issue) *Id.* at 26.

Government witness, Johnny St. Valentine Brown, was accepted by the District Court, over objection, as an expert in international narcotics distribution. Much of Brown's testimony was on the profile of a narcotics distributor. In listing general character traits of a narcotics distributor, Brown discussed the use of pagers, cellular phones, and pre-paid phone cards, stating all three were communication devices used by narcotic distributors. He

also testified that narcotics distributors generally own other business "fronts" in order to look legitimate. Petitioner and his co-defendant possessed pagers, cellular phones and pre-paid phones cards at the time of their arrest; and each owned his own business. Each of these "profile" characteristics, however, are traits which are shared equally by a large portion of the general population. *Cf. People v. Derello*, 259 Cal. Rptr. 265, 270, 211 Cal. App. 3d 414 (Ct. App. 1989). ("By themselves [profile] elements indicate no ongoing criminal activity but merely attempt to identify an individual as a type of person who may engage in a criminal enterprise based upon stereotype of drug courier appearance or behavior.") This expert testimony, in conjunction with the evidence that defendants possessed the same character traits, invited the jury "to infer from the fact that because the defendant shares some of the characteristics of these third persons that he shares their guilt of drug smuggling." *State v. Williams*, 525 N.W.2d 538, 548 (Minn. 1994). This is an impermissible propensity inference.

In light of the fact that profiles have no verifiable basis, the prejudicial impact of the testimony is severe. "There are no set limitations on the characteristics which may be used. Instead, the profiles which are being placed before juries include a seemingly endless and ever changing set of criteria, which always appear to fit the traits of the suspects involved in each case." Gregory L. Young, The Role Of Stereotyping in the Development and Implementation of the D.E.A. Drug Courier Profiles, 15 Law & Psychol. Rev. 331, 339 (1991). And, the prejudice is further exacerbated where the profile evidence is presented by an expert law enforcement officer. *See* Dean J. Nossel, Note, The Admissibility Of Ultimate Issue Expert Testimony By Law Enforcement Officers In Criminal Trials, 93 Colum. L. Rev. 231 (1993) (arguing that law officers' expert opinion may appear more reliable to a jury).

The fact that a defendant fits a profile imposes on the defendant the motivation of third parties not connected to the

case. Mark J. Kadish, The Drug Courier Profile: In Planes, Trains, and Automobile; And Now In The Jury Box, 46 Amer.L.Rev, 748, 784 (1997). The stereotypical trafficker represented by the profile is a compilation of thousands of other "presumed guilty" traffickers. Id. Consequently, the defendant is left unable to distinguish himself from the guilty stereotype and, consequently, by inference, is shown to have the requisite guilty mental state. This evidence shifts the burden of proof on the element of intent and leaves the defendant virtually unable to mount a defense against the evidence of the conduct of unknown and unidentifiable third persons. Admission of such evidence cannot be harmless error. *Cf. Sandstrom v. Montana*, 442 U.S. 510, 521 (1979) (jury charge that "the law presumes that a person intends the ordinary consequences of his voluntary acts" denied defendant due process of law because it alleviates the burden of the government to prove the element of intent beyond a reasonable doubt).

Although federal circuit courts of appeal are giving less scrutiny to this issue and permitting so called expert profile testimony to reach the jury box, the state tribunals cited herein have stopped this practice by finding that such expert testimony is a guise for stereotyping the defendant through the use of impermissible group character evidence and that this process renders the adverse trial result fundamentally unfair under a due process analysis. In order to resolve this growing jurisprudential conflict, this Court should fully examine Petitioner's argument.

III. Whether the District Court erred in sentencing Petitioner in violation of law by granting an enhancement under Sentencing Guidelines 3B1.1(b) where evidence was insufficient to prove a management or supervisory role.

The Application Notes for Sentencing Guideline § 3B1.1 explain that "to qualify for an adjustment under this

section, the defendant must have been the organizer, leader, manager, or supervisor of one or more other participants;" but "[a]n upward departure may be warranted . . . in the case of a defendant who did not organize, lead, manage, or supervise another participant, but who nevertheless exercised management responsibility over the property, assets, or activities of a criminal organization." Federal Sentencing Guideline 3B1.1, Application Note 2.

A. There was no preponderance of evidence showing that Petitioner managed or supervised other people.

Aggravated role enhancements may only be imposed for management, supervision, or control over other participants in the conspiracy. *United States v. James*, 883 F. Supp. 83, 83 (E.D. Va. 1995) (citing *United States v. Mobley*, Unpublished Opinion 1994 WL 378052 at *4-5). Management of property is insufficient for a 3B1.1 enhancement. *James* at 83.

James expressly states that "control over assets and the like can support an upward departure under [note 2] but not the application of a 3B1.1 enhancement." *James*, at 83 (citing *United States v. Fones*, 51 F.3d 663 (7th Cir. 1995). Petitioner received a three level sentence enhancement under 3B1.1(b). Without evidence of management or supervision of people, the 3B1.1 enhancement was an improper application of the guidelines.

The government alleged that Petitioner supervised "the activities of [key witness Mojica] on the night that he and co-defendant Wardrick attempted to pick up the heroin from the Ramada Inn." However, at the sentencing hearing the government retreated somewhat stating:

> "I'm not sure it matters that Petitioner was a manager or supervisor of Mr. Sirianni or Ms. Mojica. I think what's important is that he

managed, at least-in part, the activities that took place, including perhaps directing some of the individuals."

The government further argued that the evidence showed Petitioner had "some responsibility for the money that was involved," and "some significant role in seeing that the heroin arrived on July 13th. . . ," stressing that such involvement was "at least as important" to the sentence enhancement decision "as the idea that Petitioner may or may not have supervised a specific individual." The government was wrong. According to *James*, the issue of the supervision of individuals is the only inquiry in a 3B1.1 enhancement decision. *James*, at 83.

The Court found that "Petitioner" was coordinating transactions between Pakistan and the United States, including facilitating the roles of the couriers, helping to receive the drugs on the night of the arrest, obviously, keeping in contact with other illegal operatives, and was identified specifically as one who was an investor in this transaction." (emphasis added). It is note-worthy that none of the co-conspirators testified that Petitioner supervised or managed any of their activities. In fact, the only co-conspirator to even mention Petitioner, Mojica, specifically testified that she received all directions from Wardrick. Consequently, the evidence was not sufficient to prove management or supervision over people. Petitioner must be resentenced.

B. There Was No Preponderance Of Evidence Showing Petitioner Managed, Supervised, Or Controlled Any Aspect Of A Criminal Organization.

An upward departure would only be appropriate under § 3B1.1 where a preponderance of the evidence shows the defendant was a manager or supervisor of the charged

conspiracies. The Application Notes provide factors a Court must consider in making the determination: 1) whether the defendant exercised decision making authority; 2) the nature of participation in the commission of the offense; 3) the recruitment of accomplices; 4) the claimed right to a larger share of the fruits of the crime; 5) the degree of participation in planning or organizing the offense; 6) the nature and scope of the illegal activity; and 7) the degree of control and authority exercised over others. Fed. Sentencing Guideline 3B1.1, Application Note 4. Evaluating Petitioner's role in light of these factors demonstrates there is no preponderance for an upward departure.

The record shows that Petitioner had nothing to do with recruiting accomplices; Mojica and Sirianni testified that they alone recruited the Americans who went to Pakistan. There is no evidence that Petitioner made any decisions under his own authority, or, in fact, that he made any decisions at all. Mojica, the only co-conspirator to even mention Petitioner at trial, testified repeatedly that instructions for the activities in which she participated or observed came from Wardrick.

On the question of Petitioner's participation in planning and organizing the offense, the government argued that Petitioner's possession of a business card for the hotel in Pakistan where the Americans stayed, in conjunction with his alleged statement that he had been to Pakistan "a while back", "at least suggests the possibility that he was the one that set it up to begin with. . . ." While the Court should consider all relevant conduct in making a role determination, *United States v. Fells*, 920 F.2d 1179, 1184 (4th Cir. 1990), *cert. denied*, 501 U.S. 1219 (1991), proof of such conduct must be more than speculation. The only real evidence offered to connect Petitioner with Pakistan were phone calls made to Pakistan the night of the arrests after the Americans should have left the country, and the hotel business card found in Petitioner's possession. If Petitioner did call Pakistan that night, it is more likely he was seeking

information, not coordinating or facilitating activity. Further, there was no evidence that he called under his own authority.

The District Court categorized Petitioner's role as ". . . helping to receive the drugs on the night of the arrest, . . . keeping in contact by telephone with various other illegal operatives, and [being] identified specifically as one who was an investor in this transaction." The Court concluded that "Petitioner was a manager or supervisor, relatively speaking, to this operation, even though he was not the organizer or leader in the sense that Wardrick was." In so concluding, the Court made a comparison between Petitioner's role and that of the other participants. The Court wrongly concluded Petitioner was more culpable given the available evidence.

The analysis of the sentencing evidence belies the Court's erroneous conclusion. Sirianni recruited five Americans to go to Pakistan; he went to Pakistan on two occasions; he dealt directly with the alleged source in Pakistan; he assisted in obtaining Passports and Visas; he made payments to several Americans; and he arranged plane reservations to Pakistan. Petitioner had no involvement in any of these activities. Sirianni received a plea agreement to testify.

Mojica recruited Sirianni and one other American; assisted in obtaining passports and visas; bought airline tickets; made a payment to at least one American; escorted the Americans to and from their flights; assisted in buying suitcases for the trips; stored suitcases which allegedly contained heroin in her home; and participated in the attempted pick-up of the already seized heroin on the night of the arrest, making contact with Sirianni, keeping in constant communication with Wardrick, and attempting to leave with the suitcases. While the Court concluded Petitioner "helped to receive the drugs on the night of the arrest and kept in contact with various other illegal operatives," by their testimony, Mojica and Sirianni, the

government's key witnesses, were shown to have done that and more. Yet the government stipulated that Mojica qualified for a mitigated role adjustment under Federal Sentencing Guideline § 3B1.2.

The critical inquiry, however, is not just whether the defendant has done fewer bad acts than his co-defendants, but whether the defendant's conduct is material and essential to the offense. *United States v. Palinkas*, 938 F.2d 456, 460 (4th Cir. 1991), vacated sub nom; *Kochekian v. United States*, 503 U.S. 931 (1992); and reinstated sub nom, *United States v. Kochekian*, 977 F.2d 905 (4th Cir. 1992) (evaluating mitigating role factors). There is no reliable evidence that Petitioner's participation was either material or essential to the attempted delivery of the heroin.

The Court most likely considered Petitioner's alleged investment in the conspiracy as the primary factor in increasing his sentence. The only evidence pertaining to this "investment" is Mojica's testimony that Wardrick said "they" had invested a lot of money, and that "they" included Petitioner. Wardrick's hearsay statement is inadmissible as a co-conspirator statement because it was not made in furtherance of the conspiracy. Further, it is vague and uncorroborated. The District Court, however, admitted the testimony and relied upon it in the sentencing determination. The cited cumulated testimony is far from the preponderance required.

Although "F.R.E. 801(d)(2)(E) permits a statement of a conspirator to be used against other conspirators as if it were the admissions of the parties themselves," the rule is limited "by the requirement that statements be admitted under this rule only if they are made both in the course of and in the furtherance of the conspiracy. . . . The requirement that the statements have been in the furtherance of the conspiracy is designed both to assure their reliability and to be consistent with the presumption that the co-conspirator would have authorized them. . . . The requirement is not satisfied by a conversation . . . which amounted to no more

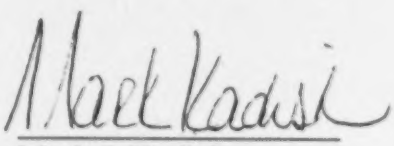
than idle chatter." *United States v. Urbanik*, 801 F.2d 692, 697 (4th Cir. 1986).

While Wardrick's statement, if made, was made in the course of the conspiracy, it in no way "furthered the purposes of the conspiracy." See *Id.* at 698. Further, if the statement was made, it was merely idle conversation which Petitioner had no available means of disputing at the time it was made or at trial. *Cf. Bruton v. United States*, 391 U.S. 123 (1968) (evidence of a non-testifying co-defendant's confession that inculpates another defendant could not be introduced at a joint trial without violation of the other defendant's constitutional rights). And, as uncorroborated hearsay, it should carry no weight in the sentence determination. Because there is no reliable evidence to support a finding of management or supervision, Petitioner's enhancement under § 3B1.1 was improper and he must be re-sentenced.

CONCLUSION AND RELIEF SOUGHT

Petitioner requests that his conviction be vacated and he be released unless the government timely initiates new charges. Alternatively, he requests re-sentencing.

Respectfully Submitted,



Mark J. Kadish
180 Lindbergh Dr.,
Ste. B
Atlanta, GA 30305
COUNSEL FOR
PETITIONER
PORTEAL GROOM

TABLE OF CONTENTS
Appendix to the Petition

Opinion,
United States Court of Appeals
for the Fourth Circuit
entered April 13, 1998 ..... App. 1

Order,
Petition for Rehearing with
Suggestion for Rehearing In Banc
United States Court of Appeals
for the Fourth Circuit
entered May 11, 1998 ..... App. 18

18 U.S.C. § 3505
Foreign Records of Regularly
Conducted Activity ..... App. 20

UNPUBLISHED
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

DONALD WARDRICK,
Defendant-Appellant,

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

PORTEAL GROOM,
Defendant-Appellant.

No. 96-4831(L); 96-4908

Appeals from the United States District Court
for the District of Maryland, at Greenbelt.
Peter J. Messitte, District Judge.
(CR-95-294-PJM)

Argued: December 5, 1997
Decided: April 13, 1998
Entered: April 13, 1998

Before MURNAGHAN, HAMILTON, and MICHAEL, Circuit Judges.

Affirmed by unpublished per curiam opinion.

COUNSEL

ARGUED: Mark Jeffery Kadish, LAW FIRM OF MARK J. KADISH, Atlanta, Georgia, for Appellant Groom; Edward Smith, Jr., Baltimore, Maryland, for Appellant Wardrick. David Ira Salem, Assistant United States Attorney, Stephen S. Zimmerman, Assistant United States Attorney, Greenbelt, Maryland, for Appellee. **ON BRIEF:** Lynne A. Battaglia, United States Attorney, Greenbelt, Maryland, for Appellee.

Unpublished opinions are not binding precedent in this circuit. See Local Rule 36(c).

OPINION

PER CURIAM:

Donald Wardrick and Porteal Groom were convicted in the District of Maryland for conspiracy to distribute heroin, 21 U.S.C. § 846, possession of heroin with the intent to distribute it, 21 U.S.C. § 841, and importation of heroin, 21 U.S.C. § 952, 963. The defendants appeal their convictions, challenging several rulings and determinations made by the trial court. Groom also appeals a three-level enhancement imposed by the court at sentencing. Finding no reversible error, we affirm.

I.

Wardrick and Groom were part of an international heroin smuggling enterprise which used young Americans as couriers to transport the drug from Pakistan into the Washington, D.C. area. The story in this case began in July 1994, when Minerva Mojica ran into her old boyfriend,

Donald Wardrick, while vacationing in Atlantic City, New Jersey. Wardrick asked Mojica if she knew some people who would be willing to "go out of town" and "make some money." Mojica talked with two of her friends, Michael Sirianni and Jennifer Heitzenrater, who said that they were interested. Thereafter, in October 1994 Wardrick and Mojica met with Sirianni and Heitzenrater in Maryland for initial discussions about the assignment. Wardrick informed Sirianni and Heitzenrater that they would be traveling to Pakistan as couriers. Details came later. Wardrick arranged for passports and visas for Sirianni and Heitzenrater. Wardrick gave them $5,000 for traveling expenses, and he paid each of them $2,500, one half of the fee for making the trip. Wardrick also gave them a set of new empty suitcases to take along. Sirianni and Heitzenrater were instructed to fly to the Pakistani border town of Lahore by way of Karachi and Islamabad, and they were to stay at a hotel in Lahore called Falletti's. They were told to wait at Falletti's until they were contacted by a man named Mateen, who would exchange suitcases with them. They would then bring Mateen's suitcases back to the United States and give them to Wardrick. When they asked what they would pick up in Pakistan, Mojica told them that it was "best that they didn't know." Sirianni and Heitzenrater made the trip in November 1994, and everything occurred as Wardrick had planned. Upon their return to the United States, the couriers met Wardrick and Mojica in Atlantic City. The four then drove to Maryland, where Heitzenrater turned the suitcases full of drugs over to Wardrick.

In the meantime, Wardrick had introduced Mojica to Porteal Groom, who told her that he had made the journey to Pakistan himself on a prior occasion. Wardrick later told Mojica that he and Groom were partners who had invested in an earlier trip which had fallen through because the heroin "wasn't right or something." Wardrick contacted Sirianni again in December 1994 to recruit other couriers to make the same trip to Pakistan, again for the same fee. Sirianni contacted three of his friends, who made a trip in January of 1995. At

Wardrick's request, Sirianni also located three couriers for a third trip in July 1995. The arrangements for the third trip were the same as before, except that the exchange of suitcases was to take place at the Kabana Hotel in Lahore rather than Falletti's. The three couriers successfully completed the first part of the assignment, but they were stopped by Pakistani Customs at Karachi Airport on their way home. Pakistani Customs Inspector Abrar Ahmed detected bulges in the lining of the suitcases carried by the couriers. When he cut the linings open, he found 139 polythene bags containing 12 kilograms of an off-white powdery substance. Ahmed field-tested the substance, determined that it was heroin, and arrested the three couriers. The drugs were kept in a government evidence warehouse in Karachi until the next day when Ahmed forwarded samples to the Pakistani National Health Laboratory in Islamabad. There, a government chemist tested the samples and confirmed that they contained heroin.

While being interrogated by Pakistani Customs, the couriers revealed that they were to meet Sirianni at JFK Airport in New York City. They also implicated Wardrick and Mojica. The Customs official, Javaid Mughal, notified United States DEA agents in Pakistan, who in turn contacted their colleagues at home. DEA agents apprehended Sirianni at the Pakistani International Airlines terminal at JFK while he was waiting for the couriers to arrive. Sirianni thereafter agreed to cooperate with the authorities.

The DEA used Sirianni to arrange a controlled delivery of the heroin-laden suitcases at a Maryland hotel on July 13, 1995. One of the DEA agents paged Wardrick using a code Sirianni had previously used to get in touch with him. Wardrick and Mojica were together on the evening of July 13 when Wardrick received the pages. Wardrick told Mojica at that time that he had to meet Groom to talk about Sirianni. At about 10:30 that night, Wardrick and Mojica drove to the hotel where Sirianni and the DEA were waiting. Groom came to the hotel in a separate car. The agents observed Groom shifting from location to location around the parking lot, performing

what appeared to be counter-surveillance. Groom made 39 cellular phone calls in four hours, including eight to Wardrick's pager number. Groom also called the cellular phone number of the heroin contact in Pakistan from a nearby pay phone.

Wardrick instructed Mojica to call Sirianni from a pay phone and ask him to come out and talk. Following instructions from the DEA, Sirianni refused to leave his room, feigning illness. After a delay, Sirianni came out of the hotel with the suitcases, placed them on the sidewalk and returned inside. Upon Wardrick's instructions, Mojica was to put the suitcases in a taxi in front of the hotel; she was to ride in the taxi for a few blocks, meet Groom (who would be following) and give the heroin to him. Mojica got no further than placing the suitcases into a taxi. At that point, Mojica, Groom and Wardrick were arrested. Mojica later decided to cooperate with the authorities.

Wardrick and Groom were indicted, and trial was set for January 9, 1996. On December 15, 1995, the government was granted a continuance (trial did not begin until May 21, 1996) because the prosecution was taking steps to obtain evidence from the Pakistani government. Thereafter, Wardrick's motion to dismiss for violation of the Speedy Trial Act was denied.

At trial the government sought to introduce hotel records confirming the couriers' stay in Lahore. These records were admitted over Wardrick's objection that they were not properly authenticated as foreign documents. The district court also admitted testimony about the heroin seized in Pakistan over defense objection that the government could not show an adequate chain of custody for the drugs. In addition, the court permitted expert testimony by Johnny Brown, a narcotics consultant with the District of Columbia police department, who testified about the methods of drug traffickers, including the use of cellular phones and pagers.

Mojica also testified against Wardrick. While Mojica was in jail awaiting trial, Mojica was shown a letter from

Wardrick instructing her to testify that Sirianni was "the man," that is, the person in charge of the heroin operation. Mojica told the jury about the contents of this letter. At the time, the court gave the jury a cautionary instruction, stating that Mojica's testimony was admissible to show Wardrick's criminal intent but that it was not admissible against Groom. When Mojica unexpectedly testified that it was Groom and not Sirianni who was "the man," the court repeated its cautionary instruction. The court, however, denied Groom's motion for a severance.

Wardrick and Groom were convicted of conspiracy to distribute heroin, possession with intent to distribute, and importation of heroin. At sentencing Groom received an enhancement under' 3B1.1 for exercising management and supervisory responsibility in the conspiracy. Wardrick and Groom now appeal their convictions, and Groom appeals his sentence.

II.

A.

Wardrick first argues that the district court erred in admitting register entries and guest charges from the Pakistani hotels where the couriers stayed. This evidence was admitted to place the couriers together at the specific Pakistani hotels designated by Wardrick. Wardrick argues that by failing to authenticate these records through the foreign records certification procedure mandated by 18 U.S.C. § 3505, the government forfeited the opportunity to introduce them at trial.

Section 3505 provides that a foreign record of a regularly conducted activity shall not be excluded as hearsay if a foreign certification attests that:

> (A) such record was made, at or near the time of the occurrence of the matters set forth, by (or from information transmitted by) a person with

knowledge of those matters;
(B) such record was kept in the course of a regularly conducted business activity;
(C) the business activity made such a record as a regular practice; and
(D) if such record is not the original, such record is a duplicate of the original.

§ 3505(a)(1). A proper "foreign certification" requires a written declaration by the custodian or "another qualified person" which subjects the declarant to criminal penalty for falsification under the laws of the foreign country. See § 3505(b) & (c)(2).

Here, each hotel custodian wrote the word "attested" and signed his name on each page of the records. This, however, provided no real indication that the hotel custodians were aware of or able to certify that the records complied with the requirements of 3505(a)(1)(A)-(D). As a result, the government offered the live testimony of Pakistani Customs Agent Mughal, who testified to each of the four statutory requirements. The government argues that Mughal was another qualified person" under the statute because he had visited the hotels and met with the custodians. Thus, according to the government, Mughal became sufficiently familiar with the hotels' record keeping systems to be able to lay a proper foundation for admissibility under § 3505.

The government relies on United States v. Hathaway, 798 F.2d 902 (6th Cir. 1986), a case in which an FBI agent's testimony that he was familiar with the record keeping system of a corporation was sufficient to authenticate the business records under the analogous business records exception to the hearsay rule. See id. at 906; see also United States v. Franco, 874 F.2d 1136, 1139-40 (7th Cir. 1989) (holding that agent's "thorough description of the bookkeeping process" qualified him to authenticate business records under Rule 803(b) despite not being custodian).

In this case, Mughal testified that he went to the hotels

"a couple of times" and was told that these records were made in the ordinary course of business. We recognize that evidentiary rulings on the admission of business records are left to the sound discretion of the district court, and such rulings should be overturned only if the court abused its discretion. See Franco, 874 F.2d at 1140. We are not convinced that Mughal's testimony demonstrated a sufficient familiarity with how records were kept at the hotels for him to pass muster as a "qualified person" under the statute. His testimony does not reveal the thorough understanding of a record keeping system that courts require before an outsider can authenticate records. Accordingly, we conclude that Mughal was not a qualified witness who could provide a foreign certification under § 3505, and the hotel records were improperly admitted.

Although the district court did err in admitting these records, its error was harmless. The hotel records were offered for a very limited purpose: to place the couriers together in Pakistan at hotels designated by Wardrick. There is other evidence to connect the three couriers with Pakistan, most notably their arrest there with heroin in their possession. Furthermore, Mojica and Sirianni testified that Wardrick instructed his couriers to go to these hotels in Lahore in order to pick up the drugs. Given the weight of this other evidence, the documentary evidence that the couriers signed registers and incurred charges at two specific hotels in Pakistan fades in significance. Accordingly, the district court's error in admitting the hotel documents under § 3505 was harmless.

B.

Wardrick further argues that the district court erred when it admitted into evidence testimony that the packets of off-white powder taken from the couriers in Pakistan contained heroin. He argues that because the government failed to produce a witness from the Pakistani evidence warehouse, the chain of custody was broken between the

customs official who seized the contraband at the Karachi airport and took it to the evidence warehouse and the National Health Laboratory which received samples of the substance by messenger and determined it to be heroin.

A determination by the trial court that an adequate chain of custody has been established is reviewed for an abuse of discretion. See United States v. Ricco, 52 F.3d 58, 61 (4th Cir. 1995). We have said that:

> precision in developing the "chain of custody" is not an iron-clad requirement, and the fact of a missing link does not prevent the admission of real evidence, so long as there is sufficient proof that the evidence is what it purports to be and has not been altered in any material aspect.

United States v. Howard-Arias, 679 F.2d 363, 366 (4th Cir. 1982) (citations and internal quotation omitted). In Howard-Arias the prosecution failed to produce the DEA agent who transported bales of marijuana seized from a disabled boat to a DEA testing laboratory. It did produce the Coast Guard officer who seized the marijuana, the officer to whom he surrendered it, the DEA custodian at the laboratory and the DEA chemist who tested the marijuana. We held that the purpose of the chain of custody requirement is merely to"convince the court that it is improbable that the original item has been exchanged with another or otherwise tampered with." Id. Even though the one DEA agent did not testify, we held that the district court did not abuse its discretion in admitting the evidence. See id.

Here, the chain of custody of the heroin seized in Pakistan is sufficiently clear from the testimony presented at trial. Pakistani Customs Inspector Ahmed, who seized the heroin from the couriers, testified that he hand-carried the substance to the evidence warehouse. He further testified that the next day he sent samples of the contraband by messenger to the National Health Laboratory. Mohammed Rajput, a

chemist at the Laboratory, testified that he received the evidence intact and determined it to be heroin. Customs Agent Mughal testified that he personally obtained more samples from the bags of heroin in the evidence warehouse and gave it to DEA Agent Lowe. Agent Lowe testified that these same samples were placed in sealed DEA evidence envelopes in Pakistan and that the envelopes were transported to the United States by diplomatic pouch. The DEA chemist testified that the envelopes were sealed when he received them. The only missing link in the chain of custody is between the warehouse and the Pakistani National Health Laboratory. We find this virtually indistinguishable from Howard-Arias, where a missing link (the agent who received the marijuana from the Coast Guard and transported it to the DEA lab) did not prohibit the introduction of the drugs. Accordingly, we conclude that the district court did not abuse its discretion in concluding that the chain of custody was sufficient to admit into evidence the testimony that the powdery substance seized from the couriers in Karachi was heroin.

C.

Mojica testified that while in jail awaiting trial a woman visited her and showed her a letter from Wardrick. This letter, which had been handwritten by Wardrick, instructed Mojica to implicate Sirianni as "the man," that is, head of the heroin conspiracy. Mojica testified that this was an attempt to persuade her to perjure herself because Groom, not Sirianni, was the person in charge. Id. Wardrick challenges the admission of Mojica's testimony about the contents of this letter for purposes of establishing his guilt.

Over a century ago the Supreme Court held that an attempt to cause a witness to perjure herself was itself evidence that "tend[s] to show guilt." See Wilson v. United States, 162 U.S. 613, 621 (1896). We have held that an attempt by a defendant to tamper with a witness is admissible to show the defendant's criminal intent. In United States v.

Reamer, 589 F.2d 769 (4th Cir. 1978), the defendant met privately with government witnesses prior to their trial testimony. Those witnesses thereafter disavowed previous statements made to federal agents. We upheld a jury instruction saying "if the jury found that the defendant attempted to suppress evidence, it could consider such evidence against him on the issue of consciousness of guilt." Id. at 770. Here, Mojica testified that Wardrick told her in his letter to perjure herself and implicate Sirianni (another conspirator cooperating with the government) as the ringleader. In light of Wilson and Reamer the district court did not abuse its discretion in admitting testimony on the content of the letter as evidence of Wardrick's criminal intent.*

Groom also takes issue with the admission of the contents of the letter, although for a different reason. He argues that the prosecution improperly used Mojica's testimony about Wardrick's letter to implicate Groom, despite the judge's instruction that the jury could only consider the letter as evidence against Wardrick. Groom suggests that the letter telling Mojica to lie, combined with her testimony implicating Groom as "the man," constituted a statement by a codefendant (Wardrick) that implicated Groom. This, according to Groom, violated Bruton v. United States, 391 U.S. 123 (1968). In Bruton the Supreme Court held that a defendant's Sixth Amendment right of confrontation is violated when he is inculpated by a non-testifying codefendant's prior statement. The Court held that such evidence should not be admitted because the codefendant "cannot be tested by cross-examination" without violating his Fifth Amendment rights. In such situations, the trial court must

---

* Wardrick also argues that permitting Mojica to testify as to the content of the letter violated the best evidence rule. Since the evidence showed that the letter remained in the possession of one of Wardrick's confederates (the woman who visited Mojica at the jail), and since Mojica was available for cross-examination on the contents of the letter, this argument has no merit.

either redact the codefendant's statement or order a severance. See id. Groom argues that the district court violated Bruton when it denied his motion for a severance.

In United States v. Campbell, 935 F.2d 39 (4th Cir. 1991), three persons (Campbell, Best, and Gadson) were involved in a crack distribution conspiracy. When Campbell was arrested, he spontaneously stated that he had "gotten crack cocaine from Best." Id. at 43. At trial Best cooperated with the government and testified to Gadson's role in the conspiracy. Gadson argued that Campbell's post-arrest statement (which was admitted at trial), combined with Best's testimony, constituted a violation of Bruton. We rejected this argument because "[s]tanding alone, Campbell's statement did not incriminate Gadson. If the statement did incriminate Gadson in the manner he contends, it is only because Best testified to Gadson's involvement in the conspiracy." Id. Since Best was available for cross-examination, Gadson's right of confrontation was not violated. See id.; accord United States v. Locklear, 24 F.3d 641, 646 (4th Cir. 1994).

The facts in this case are similar to those in Campbell. Wardrick's letter did not refer to Groom in any way. It referred to Sirianni. The only possible connection to Groom is Mojica's testimony at trial. Mojica, of course, was available for cross-examination on her statement that Groom was "the man." Therefore, Groom's right to confrontation was not violated. Furthermore, the district court gave a strong prophylactic instruction before Mojica's testimony, admonishing the jury not to consider Mojica's testimony against Groom, and repeating it after she was finished. Compare Locklear, 24 F.3d at 646 & n.2 (questioning whether limiting instruction was necessary in similar situation). We therefore cannot say that the court abused its discretion in denying Groom's motion for a severance.

D.

Groom also challenges a three-level enhancement he

received for being a manager or supervisor in the conspiracy. Section 3B1.1 of the Sentencing Guidelines provides for a three-level enhancement for a defendant who "was a manager or supervisor (but not an organizer or leader)." U.S.S.G. ' 3B1.1(b). The Application Note for this section sets forth the test to be used in determining whether a defendant was a manager or supervisor:

> Factors the court should consider include the exercise of decision making authority, the nature of articipation in the commission of the offense, the recruitment of accomplices, the claimed right to a larger share of the fruits ofthe crime, the degree of participation in planning or organizing the offense, the nature and scope of the illegal activity, and the degree of control and authority exercised over others.

Id. App. Note 4. The district court's determination of a defendant's management or supervisory role may only be reversed if clearly erroneous. See United States v. Hyppolite, 65 F.3d 1151, 1159 (4th Cir.1995).

In its factual findings at sentencing, the district court found that Groom played a coordinating role in the heroin smuggling operation. The court based this finding on evidence that Groom was Wardrick's "partner" and that Groom made a number of phone calls to a heroin contact in Pakistan while waiting for a delivery of drugs from Sirianni outside a hotel in Maryland. Furthermore, Mojica testified that when she was suspicious as to Sirianni's reluctance to meet her, she looked to Groom for direction. From these facts, the court concluded that Groom played a managerial or supervisory role in the conspiracy. This was not clearly erroneous, so we affirm room's sentence.

E.

Wardrick also presented several other arguments. because we find them to be without merit, we will be brief in disposing of them.

1.

Wardrick claims that he was denied his right to a speedy trial because the district court granted a continuance in order to permit the government to obtain evidence from Pakistan. The Speedy Trial Act permits a criminal trial to be delayed up to one year if "an official request . . . has been made for evidence . . . in[a] foreign country." 18 U.S.C. §3161(h)(9). The Act refers to a different section, 18 U.S.C. §3292, for the definition of the term"official request." That term is defined as:

> a letter rogatory, a request under a treaty or convention, or any other request for evidence made by a court of the United States or an authority of the United States having criminal law enforcement responsibility, to a court or other authority of a foreign country.

Section 3292(d) (emphasis added). Determinations of excludable time are reviewed for clear error. See United States v. Revis, 48 F.3d 763, 770 (4th Cir. 1995).

Here, the government requested and received a continuance in order to obtain evidence, namely drugs and packaging held by a Pakistani court. See JA at 44. This request was made to a Pakistani prosecutor on December 14, 1995, by telephone in an effort to shortcut the more formal (and time consuming) diplomatic procedure of obtaining a letter rogatory. The request by telephone is sufficient to constitute an official request under § 3292, and the district judge did not err in granting the government's motion for a continuance based

on this official request. The Speedy Trial Act permits the period (up to a year) of such a continuance to be excluded. Wardrick was not denied a speedy trial under the Act because his trial began within about five months of December 15, 1995, the date the continuance was granted.

2.

Wardrick further complains about background testimony on the heroin trade. Specifically, he points to the testimony of Johnny Brown, who testified that drug traffickers frequently use pagers, cellular phones and phone cards for communication. This testimony, Wardrick argues, was impermissible character evidence.

We have repeatedly endorsed the use of expert testimony to illustrate the methods of drug trafficking, see, e.g., United States v.Gastiaburo, 16 F.3d 582, 589 (4th Cir. 1994), and we have specifically allowed testimony on the use of cellular phones and pagers by drug traffickers, see United States v. Brewer , 1 F.3d 1430, 1436 (4th Cir. 1993). Furthermore, Brown was careful to indicate that simply carrying cellular phones or pagers is not evidence of guilt, noting that he carried a pager himself. The district court did not err in admitting Brown's testimony.

3.

Wardrick also argues that a note from the jury, delivered along with the verdict, showed that the verdict was tainted. The note read: "We have great concern for our safety, leaving the courthouse. Do we have to report back to the Clerk's office?" The trial court responded to this concern as follows:

> THE COURT: With regard to your concern, I have, as I say, no reason to belief [sic] that anything that's happened untoward in this case,

> but in order to reassure you, what I've arranged is I will ask everyone in the courtroom to remain here, and you will be escorted to your cars by the marshals.
>
> . . .
>
> I would ask the forelady, if you would step up, forelady and counsel, if you will.
>
> (At the bench)
>
> THE COURT: Madam Forelady, thank you for your service. I had talked to counsel. I want to be sure no one has made any sort of approach to any of the jurors, as far as you know?
>
> THE FOREPERSON: They have not.
>
> THE COURT: They have not. This was just a general concern?
>
> THE FOREPERSON: Correct.

Wardrick suggests that this concern for safety tainted the verdict, and that the district court erred by not making further inquiry into the issue.

Defense counsel did not object to the trial court's handling of the issue at the time. Accordingly, we review the issue for plain error. See Fed. R. Crim. P. 52(b); United States v. Olano, 507 U.S. 725, 731-32 (1993). Wardrick must therefore show that the trial court erred, that the error was plain, and that it affected his substantial rights. Even if these factors were satisfied, we will not exercise our discretion to correct the error unless it "seriously affected the fairness, integrity or public reputation of judicial proceedings." Olano, 507 U.S. at 732 (citation and internal quotations omitted). Wardrick cannot point to anything even suggesting that the

jury's general safety concern had any effect on the verdict. Nor does he demonstrate that the jury was influenced by an improper motive in finding him guilty. We see no error at all in the way the district court handled the jury's note.

III.

For the foregoing reasons, the convictions of Wardrick and Groom are affirmed, and Groom's sentence is affirmed.

AFFIRMED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

DONALD WARDRICK,

Defendant-Appellant.

Case Number 96-4831
Civil Action Number CR-95-294-PJM

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

PORTEAL GROOM,

Defendant-Appellant.

Case Number 96-4908
Civil Action Number CR-95-294-PJM

Filed: May 11, 1998
Entered: May 11, 1998

ON PETITION FOR REHEARING WITH
SUGGESTION FOR REHEARING IN BANC

The appellants have filed a petition for rehearing. Appellant Wardrick has also filed a petition for rehearing and suggestion for rehearing in banc. Both petitions were submitted to this Court. As no member of this Court or the panel requested a poll on suggestion for rehearing in banc, and

As the panel considered the petitions for rehearing and is of the opinion that they should be denied,

IT IS ORDERED that the petitions for rehearing and suggestion for rehearing in banc are denied.

For the Court,

/s/ Patricia S. Connor
CLERK

18 U.S.C. § 3505. Foreign Records Of Regularly Conducted Activity

(a)

(1) In a criminal proceeding in a court of the United States, a foreign record of regularly conducted activity, or a copy of such record, shall not be excluded as evidence by the hearsay rule if a foreign certification attests that --

(A) such record was made, at or near the time of the occurrence of the matters set forth, by (or from information transmitted by) a person with knowledge of those matters;

(B) such record was kept in the course of a regularly conducted business activity;

(C) the business activity made such a record as a regular practice; and

(D) if such record is not the original, such records is a duplicate of the original;

unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness.

(2) A foreign certification under this section shall authenticate such record or duplicate.

(b) At the arraignment or as soon after the arraignment as practicable, a party intending to offer in evidence under this section a foreign record of regularly conducted activity shall provide written notice of that

intention to each other party. A motion opposing admission in evidence of such record shall be made by the opposing party and determined by the court before trial. Failure by a party to file such motion before trial shall constitute a waiver of objection to such record or duplicate, but the court for cause shown may grant relief from the waiver.

(c) As used in this section, the term --

(1) "foreign record of regularly conducted activity" means a memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, maintained in a foreign country;

(2) "foreign certification" means a written declaration made and signed in a foreign country by the custodian of a foreign record of regularly conducted activity or another qualified person that, if falsely made, would subject the maker to criminal penalty under the laws of that country; and

(3) "business" includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.